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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1929
No. 261

WILLIAM MILLER, PETITIONER,

VS.

H. J. McLAUGHLIN, SECRETARY OF THE DEPARTMENT OF AGRICULTURE FOR THE STATE OF NEBRASKA, AND FRANK O'CONNELL, CHIEF GAME WARDEN FOR THE STATE OF NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR THE RESPONDENTS

C. A. SORENSEN,
Attorney General, and
GEORGE W. AYRES,
Assistant Attorney General,
Counsel for Respondents.

Lincoln, Nebraska.

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OPINION OF THE SUPREME COURT OF NEBRASKA.

Miller v. McLaughlin, et al.
(No. 26612.)

"The admission of Nebraska into the Union established her state sovereignty over the entire area within her boundaries, except as restricted by treaty, by act of Congress, or by the federal Constitution.

"The eastern boundary of Nebraska is the middle of the channel of the Missouri river. 13 Stat., p. 47, c. 59 § 2.

"The acts of Congress granting to Iowa and Nebraska concurrent jurisdiction 'on' the Missouri river do not prevent Nebraska, without the concurrence of Iowa, from exercising criminal and civil jurisdiction west of the boundary line in the middle of the channel nor prevent Nebraska from enacting and enforcing the law that forbids the use of fishing nets, traps and seines in that part of the river.

"Treaty-making power has been committed to the federal government and not to individual states of the Union.

"If Iowa and Nebraska, with a common boundary line in the middle of the channel of the Missouri river, do not agree on public policy or on methods of exercising concurrent jurisdiction granted by Congress, the Missouri river is not for that reason a zone without police protection, where the offenses known to the criminal law may be committed with impunity.

"The sovereign power to define crimes and to authorize penalties therefor is inherent in state government.

"The exercise of police power to protect food at the source of supply within state boundaries is a legitimate function of sovereignty and may extend to the protection of fish in a river where the boundary line between two states is the middle of the channel.

"To prevent conflict of authority and double punishment in the exercise of concurrent jurisdiction granted by congress to two states, where there is doubt about the exact situs of a crime committed on or near the boundary line in a river, the state first acquiring jurisdiction may retain it to the exclusion of the other.

"A valid exercise of police power may affect or destroy property values, where the use of the property for its original purpose has become unlawful by a change in public policy as disclosed by a new statute. *Mugler* v. *Kansas,* 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205.

"Appeal from District Court, Lancaster County; Wheeler, Judge.

"Suit by William H. Miller, Jr., against H. J. McLaughlin, Secretary of the Department of Agriculture, and another judgment for plaintiff, and defendants appeal. Reversed and rendered.

"O. S. Spillman, Atty. Gen., and Geo. W. Ayres, Asst. Atty. Gen., for appellants.

"Seymour L. Smith, of Omaha, for appellee.

"Heard before Goss, C. J., Rose, Dean, Thompson, and Day, JJ., and Hastings and Redick, District Judges.

"Rose, J. This is a suit in equity for an injunction to prevent the secretary of the department of agriculture and the chief game warden of Nebraska from enforcing the legislative act containing the following provisions in so far as they relate to the waters of the Missouri river:

"No person shall take or attempt to take any fish except minnows from the waters within the state of Nebraska with nets, traps or seines. Carp, suckers, gars and buffalo fish may be taken with a spear during the months of March and November inclusive. The possession of any and all seines, except minnow seines, as provided in section 7356, Compiled Statutes of Nebraska for 1922, as amended, nets or traps except as authorized by the department of agriculture shall be unlawful." Laws, 1927, c. 126, § 10.

"Plaintiff is a resident of Nebraska and owns valuable fishing nets, traps and seines. He insists that he uses them exclusively in taking fish from the Missouri river. His petition for an injunction contains pleas that the act of the Nebraska legislature is unconstitutional as applied to the Missouri river; that defendants are threatening to enforce it and to prevent plaintiff, by the use of his nets, traps and seines, from taking fish from the waters west of the middle of the channel; that Congress granted to Iowa and Nebraska concurrent jurisdiction over the Missouri river; that Iowa permits fish to be taken therefrom in the manner forbidden by the act of the Nebraska legislature; that those states have not taken concurrent or united action making effective their concurrent jurisdiction; that, in absence of such action or of an effective compact, Nebraska was without power to enact legislation preventing plaintiff from using his property to take fish from any part of the Missouri river; that the act, if enforced, will interfere with his personal and property rights and his lawful means of

livelihood and result in the illegal confiscation of his nets, traps and seines in violation of the state and the federal Constitutions.

"Defendants denied the invalidity of the legislative act and pleaded authority to enforce it.

"Upon a trial of the cause the district court found the issues of law and fact in favor of plaintiff and granted his prayer for a permanent injunction. Defendants appealed.

"The question presented by the appeal is the validity of the act as applied to Missouri river waters in Nebraska between the middle of the main channel and the Nebraska bank. The act applies alone to waters within the boundaries in Nebraska and defendants confine their jurisdiction thereto.

"(1, 2) The admission of Nebraska into the Union on an equality with the original states established her state sovereignty over the entire area within her boundaries, except as restricted by treaty, by act of Congress or by the federal Constitution. The eastern boundary of Nebraska is the 'middle of the channel' of the Missouri river. 13 Stat., c. 59, § 2, p. 47; Comp. St. Neb. 1922, p. 28, § 2. The western boundary of Iowa east of Nebraska is the same. An act of Congress provides:

"(3) 'The said state of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; such rivers to be common to both.' 5 Stat., c. 48, § 3, p. 743; 9 Stat., c. 82, p. 52.

"(4, 5) The jurisdiction of Nebraska is not limited to the western bank of the river, unless the restriction is imposed by the words 'shall have concurrent jurisdiction' as they appear in the provision quoted. The meaning of the expression has been the subject of judicial discussion and of some diversity of opinion. The better view seems to be that those words do not prevent one state from exercising generally civil and criminal jurisdiction over that part of the river within her own boundaries. The power to make treaties has been committed to the federal government and not to individual states. One state cannot require another to unite in treaties, laws, contracts or compacts. If Iowa and Nebraska, with a common boundary in the Missouri river, do not agree on public policy or on methods of exercising concurrent jurisdiction granted by Congress, the river is not for that reason a zone without police protection, where the offenses known to criminal law may be committed with impunity. The exigency of preserving order along the border does not necessarily await the concurrent action of two states. Their interests may conflict and they may never agree. The concurrent jurisdiction authorized by Congress is not 'over' or 'in' the river, but 'on' the river. Each state, as to river waters within her own boundaries, has rights and powers not committed to the adjoining state. The Supreme Court of the United States once took occasion to say:

" 'To avoid misunderstanding it may be well to add that the concurrent jurisdiction given is jurisdiction "on" the river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other state.' *Wedding* v. *Meyler,* 192 U. S. 573, 24 S. Ct. 322, 325 (48 L. Ed. 570, 66 L. R. A. 833).

"(6, 7) It is clear, therefore, that concurrent jurisdiction is not all-inclusive as applied to the Missouri river. The sovereign power to define crimes and to authorize penalties therefor is inherent in state government. The exercise of police power to protect food at the source of supply within state boundaries is a legitimate function of sovereignty. *Fisher* v. *Board of Regents*, 108 Neb. 666, 189 N. W. 161; *McFadden* v. *Denter*, 117 Neb. ——, 223 N. W. 462. The natural run of fish from the Missouri river into Nebraska rivers and creeks affects the food supply of the state. Concurrent jurisdiction of Nebraska and Iowa 'on' the Missouri river does not prevent the legislature of Nebraska, without the consent of Iowa, from passing laws to prevent fishermen from interfering with the run of fish by stretching nets across Nebraska streams at confluences with the Missouri river. Protection of fish generally in waters within the boundaries of the state is equally clear. There is the highest authority for these views. On this subject the Supreme Court of the United States spoke as follows:

"'The territorial limits of Kentucky extend across the river to low-water mark on the northerly shore. * * * * And we think it clear that no limitation upon the power of that commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact. *Nicoulin* v. *O'Brien*, 248 U. S. 113, 39 S. Ct. 23, 63 L. Ed. 155.

"Plaintiff's understanding of concurrent jurisdiction is also at variance with the following view:

"'Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of

the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel." *Nielsen* v. *Oregon*, 212 U. S. 315, 29 S. Ct. 383, 53 L. Ed. 528.

"(8) To prevent conflict of authority and double punishment in the exercise of concurrent jurisdiction granted by Congress to two states, where there is doubt about the exact situs of a crime committed on or near the boundary line in a river, the state first acquiring jurisdiction may retain it to the exclusion of the other.

"Cases in federal district and circuit courts, containing interpretations of concurrent jurisdiction at variance with rulings of the Supreme Court of the United States have been cited, but are of course not controlling.

"(9) Plaintiff insists that he owned and lawfully used his nets, traps and seines before the legislative act assailed was passed, and argues that they will be depreciated in value or destroyed without due process of law in violation of the Constitution, if the legislation is enforced. A valid exercise of police power may affect or destroy values, where the use of the property for its original purpose has become unlawful by a change in public policy as disclosed by a new statute. Prohibition thus affected property in breweries, but the legislation on that subject was nevertheless sustained. *Mugler* v. *Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205.

"Invalidity of the legislative act in controversy has not been shown. The injunction granted by the district court is therefore reversed and the action dismissed."

ERRORS ALLEGED BY PETITIONER

The petitioner alleges that:

1. The Supreme Court of Nebraska erred in holding that the grant by Congress of concurrent jurisdiction over the Missouri river to Iowa and Nebraska does not prevent the State of Nebraska from prohibiting the taking of fish from that river in a manner sanctioned and licensed by the State of Iowa.

2. The Supreme Court of Nebraska erred in holding that the provision that the possession of nets, traps and seines should be unlawful is a valid exercise of the police power and is not violative of the provisions of the Constitution of the United States.

The respondents take issue with the petitioner upon both these propositions.

ARGUMENT

It is alleged in the petition and was admitted by the respondents at the trial that the law of Iowa provides that:

> Section 1747. CODE OF IOWA. "It shall be lawful for any person to take from the Mississippi or Missouri rivers within the jurisdiction of the state, any fish with nets or seines upon procuring from the State Game Warden, an annual license for the use of such nets and seines."

The implication from such statement is that it is unlawful under the laws of Iowa for one to catch fish by the use of a seine in either the Mississippi or the Missouri river unless he has an annual license from the state game warden of that state.

In the instant case the petitioner Miller admitted at the trial that he had no license to fish in the state of Iowa, but he testified that he had fished with nets on both the Nebraska side and the Iowa side of the Missouri river.

It thus appears that he was violating the laws of both Iowa and Nebraska when he fished with a net or seine in the Missouri river. He was violating the law of Iowa because he did not have a license to fish from that state and he was violating the law of Nebraska because it was unlawful to fish with a net or seine for game fish anywhere within the borders of the state.

This court has recently spoken in no uncertain terms upon the precise question involved in this case. In *Nicoulin* v. *O'Brien,* 248 U. S. 113, this court said:

> "The territorial limits of Kentucky extend across the river to low-water mark on the northerly shore. * * * * And we think it clear that no limitation upon the power of that commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact."

If the language there used is paraphrased to read as follows: "The territorial limits of Nebraska extend to the middle of the channel of the Missouri river. And we think it clear that no limitation upon the power of that commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by provision of statute," the principle announced in that case would be made applicable in this case.

No reason occurs to us why a "concurrent jurisdiction" established by compact should necessarily be different than a "concurrent jurisdiction" established by statute nor do we understand why it should be held that a state whose boundary line is the low water on one side of a river should have a right to protect fish wherever they may be found within its territorial limits and regardless of any "concurrent jurisdiction" any other state may have on that river while another state whose boundary line is the middle channel of a river is unable to protect the fish within its territorial boundaries on that river because of the concurrent jurisdiction some other state may have on that same river.

It is true fish may easily cross from one side to the other of the river and thus prevent the protection from being as complete as it would otherwise be but it is also true that fish can swim either up or down the river and thus get within the territorial limits of another state but we assume that no one will contend that a state can not protect the fish in a river within its boundaries without the concurrent action of all the states through which the river runs or whose boundary line it touches. Other states have taken the same view of the law that the Supreme Court of Nebraska has taken. Thus the Supreme Court of Wisconsin has said:

> "A state's jurisdiction to enforce its fish laws is coextensive with the boundaries of the state, though they consist of the thread of a navigable stream over whose waters adjacent states have concurrent jurisdiction for other purposes."
>
> *State* v. *Bowen*, 135 N. W. 494, 149 Wis. 203.

Similarly, in the case of *State* v. *Carroll*, 79 Tex. Cr. 359, the Supreme Court of Texas has held that the jurisdiction

of Texas extended to the catching of fish in the Red river which is the boundary line between Texas and Oklahoma.

The learned counsel for petitioner cite in support of their contention the case of *Nielson* v. *Oregon*, 212 U. S. 315. They say:

> "It is believed that the case decided by this court, most clearly in point, is that of *Nielsen* v. *Oregon*, 212 U. S. 315, in which it was held that the state of Oregon cannot, by virtue of its concurrent jurisdiction over the Columbia river, *make criminal* the operation of a purse net in that river within the territorial limits of the state of Washington, under authority and license from that state."

It is a far cry from the facts in that case to the facts in the instant case. In that case it was the contention of the Oregon court that it had jurisdiction to punish an alleged offense against the laws of Oregon even though that offense was committed within the territorial limits of another state and consisted in the violation of a statute which purported to extend the jurisdiction of the state of Oregon beyond territorial limits of that state.

In the instant case the statute that has been assailed by the petitioner but upheld by the Supreme Court of Nebraska does not purport to be effective anywhere beyond the territorial limits of the state. The name of any boundary stream is not mentioned in it.

The second assignment of error made by the petitioner is without merit.

In an analagous situation this court held that:

> "It is within the power of a state to preserve from extinction fisheries in waters within its jurisdiction,

by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish.

"The provision in the statutes of New York, c. 591 of the Laws of 1880, as amended by c. 317 of the Laws of 1883, that nets set or maintained upon waters of the state, or on the shores of or islands in such waters, in violation of the statutes of the state enacted for the protection of fish, may be summarily destroyed by any person, and that it shall be the duty of certain officers to abate, remove, and forthwith destroy them, and that no action for damages shall lie or be maintained against any person for or on account of such seizure or destruction, is a lawful exercise of the police power of the state, and does not deprive the citizen of his property without due process of law, in violation of the provisions of the Constitution of the United States."

Lawton v. *Steele,* 152 U. S. 133.

The decision in *Lawton* v. *Steele* has been cited with approval in the case of *Miller* v. *Schoene,* 276 U. S. 272, and in other recent cases.

CONCLUSION

The conclusion reached by the learned counsel for petitioner that the state of Nebraska can not regulate fishing on the Missouri river even within its own boundaries without concurrent action upon the part of the state of Iowa is directly contrary to the position taken by the latter state. In the case of *State* v. *Moyers,* 136 N. W. 896, the Supreme Court of Iowa said:

"The 'concurrent jurisdiction' on the Mississippi, so far as said river shall form a common boundary to Iowa and any other state, given Iowa by Act March 3, 1845, c. 48, 5 Stat. 742, means that all the jurisdiction which might otherwise have been exer-

> cised by it with reference to transactions on the part of the river within its boundary shall be possessed and exercised by it with reference to like transactions on any part of the river between it and another state without regard to boundary; so that, as by Acts 33d Gen. Assem. c. 155, as amended by Acts 34th Gen. Assem., c. 117, it has done, it may prohibit fishing thereon with nets, without a license from Iowa, and in case of violation thereof, though on the Illinois side of the river, punish the same, even though the offender have a license from Illinois."

It is inconceivable that the Supreme Court of Iowa should contend that the state of Iowa had any greater rights upon the boundary rivers of the state than had other states that were also bounded by the same river

What that court must have meant was that either one of two states whose common boundary was the center of the channel of a river flowing between them might prohibit fishing thereon with nets and that such prohibition would be a valid exercise of the police power even though the fishing took place upon the opposite side of the river and though the offender had a license to do such fishing from the other state.

We submit, therefore, that the decision of the Supreme Court of Nebraska should be affirmed.

Respectfully submitted,

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Assistant Attorney General,
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State Capitol,
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